Petition

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ALEXANDER L. STEVAS,
CLERK

81-957

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

ANTONINO JOSPEH RUGGIRELLO,
Petitioner

-vs-

BARRY MINTZES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 81-1285

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STATEMENT OF QUESTION PRESENTED

Where the identity of the intended victim is an element of the crime of attempted murder, and where petitioner pleaded guilty to the third count of the information which charged attempted murder but did not name the intended victim, and where neither the trial court nor petitioner mentioned the name of an intended victim during the plea taking, is petitioner's conviction constitutionally infirm because he was deprived of his due process right to be informed of the true nature of the charge against him?

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Constitutional Provisions:

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14th Amend, US Constit 1, 5

Other:

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JURISDICTION OF THE COURT

The Order of the Court of Appeals sought to be reviewed is dated October 26, 1981 and it was entered on October 26, 1981.

Jurisdiction to review said Order is conferred, it is believed, upon this Court by 28 USC 1254 .

CONSTITUTIONAL PROVISION INVOLVED

Amendment 14, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 6, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This case orginated in the Recorder's Court for the City of Detroit, Michigan, a court of criminal jurisdiction of felonies and misdemeanors committed within the City of Detroit.

Petitioner was charged in a three count information with (1) solicitation to commit first-degree murder, (2) conspiracy to commit first-degree murder, and (3) attempted murder (11a-12a).*

Petitioner pleaded guilty to the charge in the third count—attempted murder; the other two counts were dismissed. Petitioner was sentenced to a term of 10 years to 20 years and at date hereof is in prison in the State of Michigan.

Petitioner appealed his conviction and sentence as a matter of state constitutional right to the Michigan Court of Appeals and his conviction was affirmed by that Court. Petitioner applied to the Michigan Supreme Court for leave to appeal [an appeal to the Michigan Supreme Court is a discretionary appeal rather than an appeal as of right], and this application was denied.

Petitioner then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, Southern Division under authority of *28 USC 2254*. By judgment of that Court, said petition was denied. After obtaining a certificate of probable cause from the district court, petitioner appealed as of right from the judgment denying habeas corpus to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the judgment denying petitioner's petition for writ of habeas corpus in Case No 81-1285.

ARGUMENT

In Count I of the information, the intended victim was named as Ralph Billy Proctor (11a).

In Count II of the information, the intended victim was named as Ralph Billy Proctor (11a).

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* The a in the parentheses refers to the Appendix of this Petition; the numbers, to the pages within.

In Count III, *no intended victim whatever was named* (11a).

When petitioner was pleading guilty, neither the court nor the petitioner mentioned the name of an intended victim.

In Count III no portion of any of the two proceeding counts was incorporated by reference into Count III (11a).

The Court of Appeals in its Order stated that '[t]he omission of the name was, to be sure, a technical defect in this count of the information' (2a). But the Court of Appeals refused to reverse the judgment of the lower court because 'convictions will not be reversed because of technical deficiencies in the charging papers which do not prejudice the accused' (2a).

The Court of Appeals apparently concluded that petitioner was not prejudiced because petitioner 'does not claim that he was unaware of the identity of the intended victim' (2a) and because petitioner's 'intended victim was set forth in the first two counts of the information but not in the third' (2a).

It is clear that the Court of appeals *assumed* that the prosecutor meant to charge that the intended victim in the third count was the same as named in the first two counts.

It is further clear that such an assumption cannot be made. Each count of an indictment or an information must stand on its own feet and must be regarded as a separate indictment or information and nothing from any other count can be regarded as part of it unless expressly and specifically incorporated by reference. *Dunn* v *United States*, 284 US 390, 393 (1931); *People* v *Vaughn*, 409 Mich 463, 465 (1980); *United States* v *Huff*, 512 F2d 66, 69 (CA5 1975); *United States* v *Fulcher*, 626 F2d 985 (CADC 1980).

Thus, we are left with Count III in which the essential element of the name of the intended victim does not appear.

That the name of the intended victim is an essential element of the crime of attempted murder is clear and it must be alleged in the indictment or information. *86 ALR2d 724, HOMICIDE–IDENTIFICATION OF VICTIM; United States* v *Simmons*, 96 US 360, 362-363 (1878); *United States* v *Hess*, 124 US 483, 486-487 (1888); *Tarkaney* v *Commonwealth*, 43 SW2d 34, 41 (Ky 1931); *Alexander* v *State*, 153 SE2d 431, 432 (GA 1967); *Commonwealth* v *Dews*, 239 A2d 382, 384 (Pa 1968).

The 'first and most universally recognized requirement of due process' is 'real notice of the true nature of the charge against' the accused. *Smith* v *O'Grady*, 312 US 329, 334 (1941); *Henderson* v *Morgan*, 426 US 637, 644-645 (1976).

True notice of the nature of the charge laid is accomplished by setting forth in the indictment or the information all of the elements necessary to constitute the offense intended to be punished. *United States* v *Carll*, 105 US 611, 612-613 (1881); *United States* v *Cruikshank*, 92 US 542, 558 (1875); *People* v *Maki*, 245 Mich 455, 476 (1929).

The Court of Appeals cited *Russell* v *United States*, 369 US 749, 763 (1962) in support of the principle that 'technical deficiencies in the charging papers which do not prejudice the accused' will not lead to reversals.

But the Court of Appeals failed to go on to note that in *Russell* the Court quoted with approval from *Smith* v *United States*, 360 US 1, 9, that 'the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules'.

And that in *Russell* the Court held that the failure of the indictments to identify the subject matter under congressional subcommittee inquiry at the time the petitioners refused to answer questions put to them was fatal to the validity of the indictments and the convictions.

The Court in *Russell* did not pause to inquire whether in fact the petitioners knew the subject matter before the subcommittee, nor whether the petitioners claimed that they didn't know the subject matter before the subcommittee, nor how the omission of the subject matter from the indictments prejudiced the petitioners.

Nor did the Court in *Russell* examine into the evidence adduced on trial to determine whether the petitioners had been apprised on trial of the subject matter before the subcommittee. The Court instead, said that '[t]he vice of these indictments, rather, is that they failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, i.e., that they failed to sufficiently apprise the defendant "of what he must be prepared to meet".'

Thus, it can be seen that the third count of the information filed in the case at bar failed to satisfy the first essential criterion by which the sufficiency of an indictment or information is to be tested in that the third cound did not sufficiently apprise the petitioner of what he had to be prepared to meet.

As a consequence, petitioner was deprived of his right to due process under the *14th Amendment to the United States Constitution* and under the *6th Amendment to the United States Constitution* to be given notice of the real nature of the charged laid against him.

CONCLUSION

It is urged to this Court that the decisions of the lower courts in this case have been in direct conflict with principles long established by cases decided by this Court.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,
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Detroit, Michigan 48226
Telephone: (313) 962-0525

Dated: Detroit, Michigan
November 17, 1981

APPENDIX

NO. 81-1285
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTONINO JOSEPH RUGGIRELLO,
Petitioner-Appellant,

v.

BARRY MINTZES,
Respondent-Appellee.

ORDER
(Filed: October 26, 1981)

BEFORE: KEITH and JONES, Circuit Judges, and HOLSCHUH, District Judge*

Antonino Ruggirello appeals from a judgment of the district court for the Eastern District of Michigan denying his petition for writ of habeas corpus. 28 U.S.C. §2254. Ruggirello raises two issues: 1) whether he was denied due process of law when convicted under a count of an information which did not name the victim of his crime; and 2) whether the Michigan trial court's acceptance of his guilty plea to a charge of attempted murder was supported by a sufficient factual basis.

Ruggirello was charged in a three-count information with 1) solicitation to commit first-degree murder, 2) conspiracy to commit first-degree murder, and 3) attempted murder. Ruggirello entered into a plea bargain which provided that he would plead guilty to the third count in exchange for the prosecutor's promise to move the dismissal of the first two counts and to seek a sentence of ten-twenty years for the attempted murder, rather than the maximum life sentence.

At the plea hearing, after a recitation by the Michigan trial court of his rights, Ruggirello pleaded guilty to attemp-

* The Honorable John D. Holschuh, United States District Judge, Southern District of Ohio, Eastern Division, sitting by designation.

ted murder. The trial court asked Ruggirello a series of questions in order to establish a factual basis for the plea. In response, Ruggirello stated that on November 22, 1976, he "went to place a bomb in a car and attempted to set it off" for the purpose of killing someone.

The name of Ruggirello's intended victim was set forth in the first two counts of the information but not in the third. Ruggirello argues that the omission of the intended victim's name from the third count renders his guilty plea null and void.

We disagree. Ruggirello does not claim that he was unaware of the identify of the intended victim or that he was otherwise prejudiced by the omission of the name from the third count. The omission of the name was, to be sure, a technical defect in this count of the information. But convictions will not be reversed because of technical deficiencies in the charging papers which do not prejudice the accused. *Russell* v. *United States*, 369 U.S. 749, 763 (1962).

Ruggirello also argues that the factual basis elicited from him at his plea hearing was insufficient to support acceptance of his guilty plea to the charge of attempted murder. We find, however, that the factual basis was adequate. Moreover, a state criminal defendant who pleads guilty may only attack, in subsequent habeas corpus proceedings, the voluntary and intelligent nature of his plea. *Tollet* v. *Henderson*, 411 U.S. 258 (1973). Ruggirello has not established that his plea was either involuntary or unintelligent.

Accordingly, the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
Clerk

Magistrate's Report and Recommendation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTONINO J. RUGGIRELLO,
Petitioner,

v. CIVIL ACTION NO. 79-74569

BARRY MINTZES,
Respondent.

MAGISTRATE'S REPORT AND RECOMMENDATION

Entered November 28, 1980

I. RECOMMENDATION.

It is recommended that the Court deny the petition for a writ of habeas corpus.

II. REPORT.

Petitioner, Antonino J. Ruggirello, pled guilty to attempted murder under M.C.L. 750.91; M.S.A. 28.286 in Detroit Recorder's Court in 1977 and was sentenced to not less than ten nor more than twenty years in prison. He is presently incarcerated at the Kinross Correctional Facility at Sault Ste. Marie, Michigan.

Petitioner appealed to the Michigan Court of Appeals which affirmed the conviction on June 22, 1979, Docket Numbers 78-176 and 78-177. His application for leave to appeal was denied by the Michigan Supreme Court on September 11, 1979, Docket Number 63403. Petitioner's motion for reconsideration of the Order dated September 11, 1979 was denied by the Michigan Supreme Court on November 28, 1979.

Petitioner now has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254 alleging

that he was deprived of his right to due process of law under the Fourteenth Amendment as follows:

1. The Count of the information to which Petitioner pled did not charge a crime because the name of the intended victim was not set forth and in his pleading Petitioner did not admit an attempt to murder a particular person;

2. His guilty plea was involuntary because the elements of attempted murder were not explained by the trial judge and Petitioner did not admit to acts which would constitute the crime of attempted murder;

3. The factual basis recited by Petitioner in the plea hearing constituted the crime of attempted assault with intent to murder contrary to M.C.L. 750.92 but the trial judge accepted the plea and sentenced defendant under M.C.L. 750.91, attempt to murder by means not constituting the crime of assault with intent to murder.

Respondent has filed a motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.Pro., and an alternative motion for summary judgment under Rule 56(b), Fed.R.Civ.Pro.

In a three-count information, Petitioner was charged with soliciting murder in the first degree, conspiracy to commit murder in the first degree, and attempted murder. Pursuant to plea and sentence agreements and upon the advice of his counsel, Petitioner pled guilty to the third count, attempted murder. The first issue raised by Petitioner concerns the sufficiency of the information. Petitioner argues that he was denied due process because the third count of the information did not identify the intended victim of the attempted murder.

With respect to guilty pleas, the Supreme Court stated in *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973):

> We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

However, a guilty plea is invalid unless it is intelligent and voluntary. *Boykin* v. *Alabama*, 395 U.S. 238 (1969). A plea cannot be voluntary in the sense that it constitutes an intelligent admission that the defendant committed the offense unless the defendant received real notice of the true nature of the charge against him. *Henderson* v. *Morgan*, 426 U.S. 637 (1976).

It is clear that Petitioner did receive real notice of the true nature of the charge against him. The intended victim, Ralph Billy Proctor, was named in Counts I and II of the information and was specifically alluded to in open court prior to sentence. (Transcript of Sentence proceedings, p. 7). Under the plea agreement, the soliciting murder in the first degree and conspriacy to commit murder in the first degree charges against Petitioner were dismissed in exchange for his plea of guilty to attempted murder. Count III of the information reads as follows:

> Antonino Joseph Ruggirello and Antonio Albert Ruggirello did attempt to commit the crime of murder in the first degree by a means not constituting the crime of assault with intent to murder, contrary to Section 750.91 and 750.316 M.C.L.A.

Petitioner does not allege that he did not know the name of the intended victim, but only that Count III of the information did not identify the intended victim.

The insufficiency of an indictment or information raises a constitutional issue cognizable in habeas corpus proceedings only if the Petitioner has been deprived of fair notice of criminal charges. There is no constitutional issue of "the notice . . . fairly but imperfectly apprises the accused of an offense for which he is to be tried." *Blake* v. *Morford*, 563 F.2d 248, 250 (6th Cir. 1977), *cert. denied*, 434 U.S. 1038. There is no indication in this case that Petitioner lacked notice of the offense charged.

Petitioner also argues that he must be protected from any subsequent prosecution for the same offense and that the omission of the intended victim's name from Count III of the information does not afford such protection. This argument is premature. However, in the event of a subsequent prosecution, under the general rule in Michigan, Petitioner would have to show that he has been indicted and convicted and that such conviction was for the same offense, *People* v. *Gault*, 104 Mich. 575, 62 N.W. 724 (1895), or for an offense arising out of the same transaction, *People* v. *White*, 390 Mich. 245, 212 N.W.2d 222 (1973). Such a defense may be supported by affidavits or court records. 1 G. Gillespie, *Michigan Criminal Law and Procedure*, 179 (2d ed. 1979).

As to his second claim, Petitioner, relying on *Henderson* v. *Morgan*, 426 U.S. 637 (1976), argues that his guilty plea was constitutionally defective because at the plea hearing, the judge did not explain the elements of the crime to which Petitioner was pleading and Petitioner did not admit to acts constituting such a crime. I find no merit in this argument.

In order for a guilty plea to be valid under *Henderson* v. *Morgan*, the defendant must have received real notice of the true nature of the charge against him. 426 U.S. at 645.

In *Morgan*, the defendant was indicted on a charge of first-degree murder, he pled guilty to second-degree murder and was sentenced to imprisonment for a term of 25 years to life. Morgan alleged that his guilty plea was involuntary because *he was not aware* that intent to cause death was an element of the offense. 426 U.S. 639. The Supreme Court agreed, on the basis of the trial judge's finding that the element of intent was never explained to Morgan. The Court noted that:

1. the charge of second-degree murder was never formally made;
2. defense counsel did not explain the element of intent or that the defendant's plea would be an admission of such an intent;
3. the record of the plea hearing contained no explanation of the charge by the trial judge; and
4. Morgan never admitted that he had the requisite intent.

Unlike Morgan, Petitioner does not allege that he was unaware of the elements of attempted murder or the consequences of his plea. He only alleges that at the plea hearing the trial judge did not recite the elements of attempted murder and that the facts recited by Petitioner did not constitute the crime of attempted murder. Petitioner does not allege that his counsel's assistance was ineffective or that his counsel did not explain the charge to him. As the Supreme Court stated in *Henderson* v. *Morgan:* ". . . it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." 426 U.S. at 647.

Petitioner's third claim is that the acts admitted to by Petitioner at the plea hearing constituted the crime of at-

tempted assault with intent to murder, contrary to M.C.L. 750.92 and that he should be punished according to the prescriptions of M.C.L. 750.92 rather than those of M.C.L. 750.91 for attempted murder. However, "there is no constitutional requirement that the trial judge inquire into the factual basis of a plea." *Roddy* v *Black*, 516 F.2d 1380, 1385 (6th Cir. 1975.) 28 U.S.C. Section 2254 provides that a federal court shall not entertain petitions for a writ of habeas corpus from state prisoners unless a prisoner is in custody in violation of the United States Constitution. Accordingly, mere irregularities in state court trial proceedings of a non-constitutional magnitude do not establish a basis for federal habeas corpus jurisdiction. *Tiitsman* v. *Black*, 536 F.2d 678 (6th Cir. 1976); *Cason* v. *Anderson*, 473 F.Supp. 20 (E.D. Mich. 1979). Therefore, because Petitioner's argument that the trial judge did not establish a factual basis for Petitioner's plea is not of constitutional dimension, it does not merit habeas corpus relief.

Accordingly, as noted at the outset, I recommend that the application for a writ of habeas corpus should be DENIED.

Respectfully submitted
(s) PAUL J. KOMIVES
United States Magistrate

DATED: November 28, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTONINO J. RUGGIRELLO,
Petitioner,

vs. CIVIL NO. 79-74569

BARRY MINTZES,
Respondent.

JUDGMENT
Entered February 27, 1981

The Court having entered an Order Accepting Magistrate's Report and Recommendation on this date based upon its review of the file and upon the report and recommendation of the Magistrate in accordance with 28 U.S.C. 636 (b) (1) (C) and having ordered that Judgment enter for Respondent;

IT IS ADJUDGED that Petitioner be granted no relief and that the action be dismissed in accordance with the order entered this date.

DATED: FEB 27 1981

(s) ANNA DIGGS TAYLOR
United States District Judge

TRIAL COURT INFORMATION
Entered 1977

WITNESSES:

P.O. MICHAEL SAAD, W.C.O.C.T.F.
P.O. THOMAS PENNYBACKER
DAVID LaPONSEY
PATRICIA LaPONSEY
THOMAS DYKSTRA, A.T.F.

STATE OF MICHIGAN—IN THE RECORDER'S COURT OF THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN

-VS-

1) ANTONINO JOSEPH RUGGIRELLO
A/K/A TONY RUGGIRELLO

2) ANTONIO ALBERT RUGGIRELLO
A/K/A TOTO RUGGIRELLO
Defendants.

DATE OF OFFENSE November 4, 1976 thru November 22, 1976

LOCATION 18200 Plymouth Road and other locations in Detroit, Michigan

COMPLAINANT

COMPLAINING WITNESS P.O. MICHAEL SAAD

DATE WARRANT ISSUED DECEMBER 23, 1976

OFFENSE COUNT I—SOLICITING MURDER IN THE FIRST DEGREE (AS TO DEFENDANT #1) COUNT II—CONSPIRACY TO COMMIT MURDER IN FIRST DEGREE (DEFENDANTS #1 & #2) COUNT III—ATTEMPTED MURDER (DEFENDANTS #1 & #2)

P-76-21553

Trial Court Information

STATE OF MICHIGAN
COUNTY OF WAYNE | ss
CITY OF DETROIT

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, WILLIAM L. CAHALAN, Prosecuting Attorney in and for the said County of Wayne, State of Michigan, who prosecutes for and on behalf of the People of the State of Michigan, comes now here in said Court in the current term thereof, and gives the said Court to understand and be informed that the above-named Defendant(s), late of the said City of Detroit, heretofore on or about the DATE OF OFFENSE set forth above, at the LOCATION set forth above, in the City of Detroit, County of Wayne, State of Michigan,

COUNT I

ANTONINO JOSEPH RUGGIRELLO FELONIOUSLY, willfully and maliciously did incite, induce or exhort DAVID LaPONSEY to aid and abet in the commission of the crime of Murder in the First Degree upon the person of RALPH BILLY PROCTOR, contrary to Sections 750.157b and 750.316 MCLA.

COUNT II

ANTONINO JOSEPH RUGGIRELLO and ANTONIO ALBERT RUGGIRELLO did willfully, maliciously and feloniously agree, conspire, combine and confederate together and with each other and with diverse other persons to commit murder in the first degree upon the person of RALPH BILLY PROCTOR, contrary to Sections 750.157a and 750.316 MCLA.

COUNT III

ANTONINO JOSEPH RUGGIRELLO and ANTONIO ALBERT RUGGIRELLO did attempt to commit the crime

of murder in the first degree by a means not constituting the crime of Assualt with Intent to Murder, contrary to Sections 750.91 and 750.316 MCLA.

And against the peace and dignity of the People of the State of Michigan.

Drafted by:
WILLIAM L. CAHALAN
Prosecuting Attorney

To: DEFENSE COUNSEL. Please take notice that the People intend to use in evidence in said prosecution the following confessions and admissions obtained from defendant(s) by law enforcing officers and persons acting in cooperation with such officers.

CONFESSION BY: DATE

ADMISSION BY: DATE

No. 76 16294

ORIGINAL INFORMATION

WILLIAM L. CAHALAN, *Prosecuting Attorney*
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